United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7232

United States Court of Appeals

FOR THE SECOND CIRCUIT

HERBERT FEDERMAN et al.,

Plaintiffs,

against

EMPIRE FIRE AND MARINE INSURANCE COMPANY et al.,

Defendants-Appellees,

and

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims,

STUART C. GOLDBERG

Additional Defendant on Cross-Claims, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

D'AMATO, COSTELLO & SHEA,
Attorneys for Appellees-
Sitomer, Sitomer & Porges et al.
116 John Street
New York, New York 10038

ROBERT E. MESHEL
Of Counsel

TABLE OF CONTENTS

		Page
PRELIMINARY STATEMENT		2
ISSUES PRESENTED FOR REVIEW		3
STATEMENT OF CASE		4
THE LAW		7
POINTS I, II and III	Appellees adopt the arguments and authorities contained in the co-Appellee-Aschkenasy's Brief in response to Appellant's Points "I", "II" and "III"	7
POINT IV	The District Court did not abuse its discretion, as a matter of law, in refusing to exercise pendent jurisdiction over the Cross-Claims of the Additional Defendant-Appellant-Goldberg	8
POINT V	The Court below did not abuse its discretion, as a matter of law, in refusing to recuse itself	18
CONCLUSION		23

TABLE OF AUTHORITIES

Page

Cases:

Adams v. United States, 302 F.2d 307 (5th Cir. 1962)..... 18

Aiello v. City of Wilmington, 426 F.Supp. 1272 (D. Del. 1976)..... 11

Birdwell v. Hazelwood School District, 352 F.Supp. 613 (E.D. Mo. 1972)..... 10

Borough v. United Steelworkers of America, 437 F.2d 748 (1st Cir. 1971)..... 15

Country Wide Ins. Co. v. Harnett, 426 F.Supp. 1130 (S.D.N.Y. 1977)..... 11

Halliday v. United States, 380 F.2d 270 (1st Cir. 1967)..... 21

Holmes v. Elks Club, Inc., 389 F.Supp. 854 (M.D.Fla. 1975)..... 11

In Re Grand Jury Investigation, 486 F.2d 1013 (3rd Cir. 1973)..... 18

In Re Murchison, 349 U.S. 133 (1955)..... 19

Kavit v. A.L. Stram & Co., 491 F.2d 1176 (2nd Cir. 1974)..... 13, 14

Kerby v. Commodity Resources, Inc., 395 F.Supp. 786 (D. Col. 1975)..... 16

Kinee v. Abraham Lincoln Federal Savings & Loan Ass'n., 365 F.Supp. 975 (E.D. Pa. 1973)..... 11

Moor v. County of Alameda, 411 U.S. 693 (1972)..... 17

Morrison v. National Broadcasting Co., 24 A.D. 2d 284, 266 N.Y.S. 2d 406 (1st Dept. 1965), rev'd 19 N.Y. 2d 453, 280 N.Y.S. 2d 641 (1967)..... 12

TABLE OF AUTHORITIES (con't)

Page

Cases:

Seneca Nursing Home v. Kansas State Board of Social Welfare, 490 F.2d 1324 (10th Cir. 1974), cert. denied 419 U.S. 841 (1975)..... 15

Swallow v. United States, 398 F.2d 348 (10th Cir. 1968)..... 21

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966)..... 9, 14

United States v. Bell, 351 F.2d 868 (6th Cir. 1968)..... 18

United States v. Columbia Broadcasting, 497 F.2d 107 (5th Cir. 1974)..... 21

United States v. Delsanter, 433 F.2d 972 (2nd Cir. 1970)..... 21

United States v. Halley, 240 F.2d 418 (2nd Cir.), cert. denied 353 U.S. 967 (1957)..... 20

United States v. Hughes, 325 F.2d 789 (2nd Cir.), cert. denied 377 U.S. 907 (1964)..... 20

United States v. Valentino, 283 F.2d 634 (2nd Cir. 1960)..... 20

United States v. Re, 373 F.2d 641 (2nd Cir.) cert. denied 388 U.S. 912 (1967)..... 20

Statutes:

28 U.S.C. §455..... 18, 20, 22

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-7232

HERBERT FEDERMAN, et al.,

Plaintiffs,

-against-

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants-Appellees,

and

STUART C. GOLDBERG and JACOB ASCHKENASY,

Additional Defendants on Cross-Claims,

STUART C. GOLDBERG,

Additional Defendant on Cross-Claims-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES-SITOMER, SITOMER & PORGES, et al.

PRELIMINARY STATEMENT

Appellant-Goldberg appeals from an Order of the Southern District of New York (MacMahon, J.) dated April 12, 1977 which suspended all further proceedings in this case pending the commencement and final determination in the State Court of those claims recited in the Cross-Claims of the Additional-Defendant-Appellant (Appendix ("App.") at pages ("pp.") 182a-183a). Appellant-Goldberg further appeals from the denial by the District Court below of his motion for an order of recusal and transfer of his case to another District Court Judge for trial.

ISSUES PRESENTED FOR REVIEW

1. Whether independant federal jurisdiction exists to support the alleged Cross-Claims of the Additional Defendant-Appellant-Goldberg after a settlement and termination of the underlying main action?

2. Whether the District Court abused its discretion, as a matter of law, in refusing to exercise pendant jurisdiction so as to retain jurisdiction over the State based Cross-Claims of the Additional Defendant-Appellant-Goldberg?

3. Whether the District Court Judge abused his discretion, as a matter of law, by refusing to disqualify and recuse himself?

STATEMENT OF CASE

Suit was initially commenced by the Plaintiff-Herbert Federman and others, alleging that they were shareholders and representatives of a class of purchasers of the common stock of the Defendant-Appellee-Empire Fire and Marine Insurance Company ("Empire"). Plaintiffs-Federman, et. al. claimed to be class representatives of purchasers of Empire stock during a specified class period. The main Complaint was previously premised under the Securities Exchange Act of 1934, the Securities Act of 1933 and upon pendant jurisdiction. The salient facts surrounding the underlying claim are summarized in a prior opinion of this Court. (App. 81a).

After the aforementioned decision was rendered by this Court and the case remanded to the lower court the main action then moved forward during the pre-trial discovery phase. Prior to the actual trial of the main action a settlement was consumated as between the class certified Plaintiffs and the various Defendant-Appellees. This settlement was ultimately approved by the lower court (App. 88a) leaving the action in the posture of having only the Cross-Claims of the Appellant-Goldberg to be resolved.

The Appellant-Goldberg's Cross-Claims against the Appellees Steven Sitomer, Alvin Sitomer and Robert Porges (hereinafter referred to as the "Sitomer-Appellees") and against the Appellee Aschkenasy are based upon state substantive law. The Cross-Claims thus are premised on novel

theories of tort, fraud and contract law.

The Appellant's Cross-Claims alleged that the Appellant was employed by Appellee-law firm and in that capacity Appellant worked on a Registration Statement in the sale of stock of the Defendant-Appellee-Empire. Appellant claims that the Sitomer-Appellees somehow conspired to violate the federal securities law by concealing the nature and details of their agreement with Empire. Appellant's first "Cross-Claim" alleged that the Sitomer-Appellees' conduct had "...the natural and probable effect of intentionally and knowingly exposing [Appellant] to the unreasonable risk of substantial harm and damage in the event that such a scheme to violate the Securities laws and/or criminal statutes would be discovered and exposed...Moreover such conduct created a condition in which it was reasonable forseeable that [Appellant] would be mistakenly implicated in the violation of the Securities laws and criminal statutes." (App. 158a). The Appellant describes his first Cross-Claim as one for "injurious involvement." (App. 149a).

The Appellant's second "Cross-Claim" alleged that the misrepresentations made to him by the Sitomer-Appellees were made in part to obtain a favorable legal opinion from him and to have him provide erroneous information to the Securities and Exchange Commission. Appellant claims such misrepresentations and his claimed reliance upon them and subsequent injuries form the basis for an action for "fraud."

(App. 165a-167a). In his third "Cross-Claim" Appellant alleges that prior to and at the time of his employment, the Sitomer-Appellees expressly and impliedly represented to him that they were competent attorneys, adhering to the requirements of the Code of Professional Responsibility. Appellant claims there were misrepresentations and that this creates an action for "breach of this warranty." (App. 167a-171a).

The Stiomer-Appellees moved to dismiss the claims against them for legal insufficiency, pursuant to Rule 12(b)(6), Fed. R. Civ. P. The Stiomer-Appellees also moved to challange Appellant's pleadings for lack of clarity under Rule 8(a)(2) and 8(e)(1), Fed. R. Civ. P. The District Court exercising its discretion under the pendant jurisdiction doctrine stayed all proceeding in Federal Court pending a final determination of these Cross-Claims in State Court. (App. 182a-183a) and this appeal followed.

Appellant also moved to have the District Court Judge disqualify himself (App. 109a) based upon Appellant's allegation that a substantial portion of Appellant's damage to his reputation was a result of the District Court's opinion (App. 67a). This motion was denied and Appellant also appeals from that denial.

THE LAW

POINTS I, II AND III

APPELLEES ADOPT THE ARGUMENTS AND AUTHORITIES CONTAINED IN THE CO-APPELLEE-ASCHKENASY'S BRIEF IN RESPONSE TO APPELLANT'S POINTS "I", "II" AND "III"

In response to Points "I", "II" and "III" of the Appellant's brief, and to avoid duplication of time and effort, the Sitomer Appellees adopt in toto all of the legal arguments and authorities cited and contained in the co-Appelee-Aschkenasy's brief on file with this Court in the captioned appeal.

POINT IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION, AS A MATTER OF LAW, IN REFUSING TO EXERCISE PENDENT JURISDICTION OVER THE CROSS-CLAIMS OF THE ADDITIONAL DEFENDANT-APPELLANT-GOLDBERG

As previously stated the main action was originally brought based on the Complaint of putative class action representatives Plaintiff-Federman, et. al. Plaintiffs alleged a conspiracy to violate the federal security laws by the various named Defendant-Appellees and invoked federal jurisdiction. Appellant was originally named as a party-Defendant by the Plaintiff-Federman but was later dropped as a party and was still later third-partied back into the action by the Appellee-Empire. Appellant ultimately interposed Cross-Claims against all Defendant-Appellees in his Answer. The Cross-Claims asserted against the Defendant-Appellees alleged unique tort, fraud and contract theories of liability as previously recited at length. (App. 149a-173a) The Plaintiff-Federman's federal action was ultimately settled before trial and subsequent thereto the Defendant-Appellees moved the court to dismiss the Appellant's Cross-Claims for want of federal jurisdiction. The District Court ultimately issued an order staying the Cross-Claims of the Appellant-Goldberg pending a determination of these claims in the State Court. Appellant-Goldberg appeals inter alia from that stay alleging that the lower court was somehow bound to adjudicate Appellant's state law premised Cross-Claims.

Under the doctrine of pendant jurisdiction, as articulated in United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), the District Court has discretionary power to hear state based claims, but:

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendant jurisdiction is a doctrine of discretion, not of plaintiff's right. It's justification lies in consideration of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them..." 383 U.S. at p. 726.

Thus, it necessarily follows that the issue on appeal is whether the District Court below somehow abused its discretion in refusing to entertain Appellant's state based claims after the main federal action had been disposed of by settlement. Appellant claims that special circumstances somehow existed such that the Court's reasons for refusing jurisdiction were insufficient.

The Court below in discussing its reasons for refusing jurisdiction cited the guidelines set down in Gibbs as follows:

> "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals." 383 U.S. at pp. 726-727.

The District Court below found substantial reasons for refusing jurisdiction of Appellant's state tort claims. Judge MacMahon found that the alleged facts recited in Appellant's Cross-Claims did not fit into any traditional or conventional tort category under New York law. The lower court was thus reluctant to venture into unexplored areas of state law. The Court also reasoned that it was not desirous of creating new state law under the guise of the non-conventional tort of "injurious involvement" which, "...present[ed] a number of novel and complex problems of state law and questions of state policy that state courts should decide..." (App. 180a). The Court also noted in its opinion that "...issues of state law predominate[d] over any issues of federal law, particularly in light of their novelty and complexity..." (App. 181a). Thus, there were sufficient reasons for the lower court to refuse to exercise jurisdiction over Appellant's Cross-Claims even without the special circumstances that Appellant relied upon.

Appellant's Brief, at p. 45, cites Birdwell v. Hazelwood School District, 352 F.Supp. 613 (E.D.Mo. 1972) for the proposition that difficulties in construing a state statute without the benefit of state case law is not a sufficient basis to deny jurisdiction. The Birdwell case involved a pendant state claim based on a then recently enacted state statute. The court, in retaining jurisdiction of the state

claim for breach of contract, noted that the construction of the new statute was involved and that there was no sense in sending that claim back to state court in order to discern the intent of the state legislature. Obviously that case is distinguishable from the case on appeal.

In Holmes v. Elks Club, Inc., 389 F.Supp. 854 (M.D. Fla. 1975), Plaintiff's state tort claim was for infliction of mental distress. After the federal claim had been dismissed, the court refused jurisdiction of the state claim stating that although there was emerging in Florida a remedy in tort for such a cause of action, the elements of the tort were "ill-defined" and there was appellate conflict within the state. The court refused jurisdiction stating:

> "...it appears the better course for this Court to take is to decline jurisdiction and allow the parties to litigate the pendent claim in the state court system and thereby obtain a more certain determination of the pertinent state law." 389 F.Supp. at 856.

See also: Aiello v. City of Wilmington, 426 F.Supp. 1272 (D.Del. 1976) (no reason was presented for the Court to "...venture forth upon uncharted state law waters where the voyage is not required."); Country Wide Ins. Co. v. Harnett, 426 F.Supp. 1030 (S.D.N.Y. 1977) present jurisdiction denied also, ("novel and important issue as to which the state law is evolving"); Kinee v. Abraham Lincoln Federal Savings & Loan Ass'n., 365 F.Supp. 975 (E.D.Pa. 1973).

Appellant's Brief, at p. 46, also contends that the lower Court erred in overstating the complexity and novelty of the state law issues involved. Appellant states that his "fraud" and "breach of warranty" claims contained elements of these traditional causes of action. Despite the foregoing, Appellant's Brief, at p. 48, admits there was no precedent for his claimed action by a lawyer against his former employer-firm. A reading of the New York cases cited by the Appellant in support of his argument indicates the lack of firm ground upon which the Court below could have based a holding that Appellant's claims did or did not state a cause of action under existing New York State law.

An examination of Appellant's claim of "injurious involvement" is another example of an area of law as yet unsettled under the New York decisions. Appellant's Brief, at p. 49, claims this tort, although non-conventional, has been recognized in New York citing Morrison v. National Broadcasting Co., 24 A.D. 2d 284, 266 N.Y.S. 2d 406 (1st Dept. 1965), rev'd 19 N.Y. 2d 453, 280 N.Y.S. 2d 641 (1967). The New York State Appellate Division, First Department, held that a cause of action for "intentional infliction of damage" is only actionable if there was no justification for the putative actions of the defendant. This claim was not identifiable with any of the categories of conventional torts and, because of the narrow construction by the court of the category of prima facie tort, the cause didn't fall

within any definable category of actionable tort. The First Department held that on the facts of the case the one year Statute of Limitations applicable to defamation didn't apply although the gist of the injury to the plaintiff was harm to reputation. In addition, the court held that special damages need not be pleaded. The Court of Appeals reversed in an opinion indicating, by way of dictum, the unsettled and complex nature of such a cause of action. The Court of Appeals never reached the question of whether such a cause of action in fact existed. This case appears to be the only reported appellate case dealing with this issue and indicates that the tort of injurious involvement is not "solidly based in recognized authority" nor that "[A]mple New York authorities exist to provide guidance to the court" as alleged in Appellant's Brief (at p. 50). In fact the cited case reinforces Appellee's position and the opinion of the Court below that even if such a claim for relief were available to the Appellant, "...there would still remain a number of extremely complicated and unprecedented questions" which should be resolved by the state and not the federal courts (App. 180a-181a).

Appellant's Brief, at p. 41, also claims that the Court below somehow abused its discretion in refusing jurisdiction of the state claims after settlement of the federal claims because of the existance of "special circumstances," as that term is defined, in Kavit v. A.L. Stram & Co., 491 F.2d 1176

(2nd Cir. 1974). Appellant claims that the Defendant-Appellees never called the pendant jurisdiction issue to the attention of the Court, thereby causing Appellant to invest a substantial amount of time in the case. Appellant's Brief, at p. 42, recites the actions of the parties after the settlement of the federal claim.

In response, Appellees claim this is not one of the "special circumstances" cited in Kavit. There this Court stated that such circumstances would include the situation where the Defendant:

> "fails to call the court's attention to the weakness of the federal claim before the court has invested a substantial amount of time in the case..." 491 F.2d at 1180, or 4. (underlining added).

Appellant appears to have misread the section. The original federal claim was based upon the federal securities law in that a securities fraud was alleged with respect to the public sale of Empire's stock. In addition, the Appellant seems to place the onus of raising the pendent jurisdiction claim upon the Appelles. He appears to fault the Appellees for not raising the issue when they moved to dismiss the Appellant's claims. There appears to be no grounds for this position. In fact, Gibbs holds that:

> "...the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation." 383 U.S. at 727.

Appellant also claims that the pendent claims "significantly invoke questions of federal policy". Kavit, supra. The Court below recognized that one of the issues

likely to be decided at trial was whether there was a violation of the federal securities law. (App. 181a). Nevertheless the Court refused jurisdiction because of the predominance of state issues over any federal issues. Here there are no significant questions of federal policy but only the issue of a violation of federal securities law. In fact if there is no such cause of action in New York the federal issue will never be reached. Even if it is, there is no reason why the state court in an action on a state claim cannot appropriately decide the federal issue. See: Brough v. United Steelworkers of America, 437 F.2d 748 (1st Cir. 1971).

Seneca Nursing Home v. Kansas State Bd. of Social Welfare, 490 F.2d 1324 (10th Cir. 1974), cert. denied 419 U.S. 841 (1975), cited by the Appellant's Brief, at page 43, dealt with a question of services provided under state and federal welfare programs. There the federal claims were not dismissed but the relief was not granted. The Court upheld pendent jurisdiction based on this circumstance and the complexity of the "intertwined federal issues." In that case there was a claim significantly invoking questions of federal policy but that is not the situation here.

Finally, Appellant argues that the retention of jurisdiction will serve the ends of judicial economy, convenience and fairness to the litigants. Appellant claims that if he is forced to litigate in state court he will begin at the

bottom of the priority list. He also claims that it is anticipated that the defendants will seek to dismiss, thus entailing more time on that motion and a further delay of trial. (Appellant's Brief at pp. 43-44). A similar argument was made in Kerby v. Commodity Resources, Inc., 395 F.Supp. 786 (D.Col. 1975). The Court stated:

> "The determination of the matter of judicial economy is not to be made on so simplistic a basis as the avoidance of another action in another court at another time. The quality of litigation is as important as the quantity of cases. Moreover, the issue of convenience of the parties means not only convenience of the plaintiff, but the convenience of the defendants as well." 395 F.Supp. at 789-790.

The purpose of refusing to exercise jurisdiction is to enable the parties to get a definitive ruling on unclear issues of state law. This is a question of fairness to both parties as well as economy and convenience. Appellant cites the many days spent on depositions but these were mostly in connection with the settled claim. Appellant's claim, as amended, is fairly new. Thus it would not be unconvenient, unfair or judicially uneconomical to all parties for the Court to refuse jurisdiction in that no discovery has taken place with respect to Appellant's Cross-Claims to date.

Since the Court below has substantial reasons for refusing jurisdiction and since there are no special circumstances present, there was no abuse of discretion by the Court below. In light of the broad discretion which the District Court has under the pendent jurisdiction doctrine,

it cannot be said that the District Judge abused his discretion in this situation. See: Moor v. County of Alameda, 411 U.S. 693 (1970).

POINT V

THE COURT BELOW DID NOT ABUSE ITS DISCRETION, AS A MATTER OF LAW, IN REFUSING TO RECUSE ITSELF

The applicable statute relating to disqualification, 28 U.S.C. §455, provides that:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial appeal, or other proceeding therein."

Appellant's Brief, at p. 53, contends that Judge MacMahon should have somehow disqualified himself because he was so connected with the facts of the case as to be substantially interested in it and that he is a material witness. It is interesting to note that Appellant disclaims any suggestion that the Judge has been or will be consciously biased against him, or that the Judge should bear any of the legal or moral responsibility for the "exacerbation" of his injuries.

The aforestated statutory provision requires that a Judge shall disqualify himself in any action in which he has a "substantial interest." A "substantial interest" has generally been defined as a pecuniary or beneficial interest. United States v. Bell, 351 F.2d 868 (6th Cir. 1968); In Re Grand Jury Investigation, 486 F.2d 1013 (3rd Cir. 1973). In Adams v. United States, 302 F.2d 307 (5th Cir. 1962) the Court stated:

> "Although it is doubtless true that the term 'substantial interest' normally refers to a pecuniary or beneficial interest of some kind, we construe the language broadly enough to comprehend the interest that any lawyer has in pushing his case to a successful conclusion." 302 F.2d at 310.

The Appellant has added on the requirement that such participation would frustrate and defeat the appearance of justice but this is not contained in the statute. It is not claimed that Judge MacMahon had any "substantial interest" in the Appellant's case. Appellant attempts to engraft onto the statute the additional requirement of the "appearance of justice." Appellant cites In Re Murchison, 349 U.S. 133 (1955). In that case the Court held that it would be strange if our system of law permitted a Judge to act as a grand jury and then try the very persons accused as a result of his investigations. It was not only a question of appearances but of the fundamental constitutional right to a fair trial. That is not the situation involved here in which a Judge who in performing his function is asked to recuse himself because a prior ruling of his was reversed and such a ruling is to be shown as a causal link in a chain of events resulting in Appellant's injuries.

The Appellant's Brief, at pp. 58-59, speaks of witnesses being required to "confront" Judge MacMahon and of the jury being influenced by the authoratative role of the Judge. There is neither a logical nor a legal basis for these unwarranted and inflamatory conclusions by the Appel-

lant. If Appellant's reasoning were followed to its logical conclusion, all District Court Judges would be potentially subject to disqualification by reason of rendering adverse decisions. The statute relating to disqualification provided for a specific and limited area of disqualification and not for the whim of a disgruntled litigant.

Appellant's Brief, at p. 61, argues that Judge MacMahon should have disqualified himself as a "material witness" to relevant trial facts. The literal terms of §455 indicate that a Judge should disqualify himself in any case where he "is or has been" a material witness. The leading case in the Second Circuit is United States v. Hughes, 325 F.2d 789 (2nd Cir. 1964), cert. denied 377 U.S. 907 (1964). The defendant moved under §445 to have the judge disqualified. The Court found the Judge's testimony would not have been relevant. It also stated that the literal terms of §455 require the judge to disqualify himself only if he is a witness. The court stated that United States v. Halley, 240 F.2d 418 (2nd Cir.), cert. denied 353 U.S. 967 (1957) and United States v. Valentino, 283 F. 2d 634 (2nd Cir. 1960) represented advice to the lower court as to a rule of good practice that the Judge who accepted the Defendant's guilty plea should not hear the motion to vacate the conviction. This literal interpretation was cited in United States v. Re, 373 F.2d 641 (2nd Cir) cert. denied 388 U.S. 912 (1967).

Appellant's reliance on Halliday v. United States, 380 F.2d 270 (1st Cir. 1967) is also misplaced. The opposite holding was announced in United States v. Delsanter, 433 F.2d 972 (2nd Cir. 1970). The Court held:

> "...nor do we find any merit in appellant's contention that a hearing on the voluntariness of a guilty plea [under FRCP 11] must be conducted by a judge other than the one who accepted the plea. Such a procedure is not required by Section 2255, and the practice in this circuit is otherwise...That the judge may bring to bear his personal knowledge of prior proceedings is an advantage rather than a mark of inherent prejudice..." 433 F.2d at 974.

This Court distinguished Halliday as a policy preference of the First Circuit.

United States v. Columbia Broadcasting, 497 F.2d 107 (5th Cir. 1974) cited by the Appellant, involves special circumstances. There the judge issued verbal orders in his chambers and then held a contempt hearing for violation of these orders. Because they were verbal orders, the judge had to determine "what he said was said was really said." The court stated that such a trial does little to protect the judicial process from any possible suspicion of bias. But that is not the case here. The fact of the opinion can easily be proven and the questions remaining involve foreseeability and causation.

In Swallow v. United States, 398 F.2d 348 (10th Cir. 1968), the court dismissed as frivolous the appellant's contention that the judge should have disqualified himself because he had been reversed on a previous appeal in the

case. That is the present situation with the additional element of the reversed opinion being a element in the tort claims. Absent any bias and any unusual circumstances, Judge MacMahon has not abused his discretion by failing to disqualify himself under §455. The Judge had no substantial interest in the case nor had he been a witness in the case and the appearances of justice did not require him to recuse himself.

In summary, no basis, let alone a arguable basis, was alleged or established to require the lower Court Judge to disqualify himself. Appellant affronts the dignity of this Court in suggesting that litigants can invoke the drastic procedure of disqualification simply because the Court below rendered a decision which was somehow an affront to the private paranoia of Appellent-Goldberg. The absurdity of this position is evident and should be summarily dealt with.

CONCLUSION

The order and opinion of the District Court staying the proceeding should be affirmed. The order of the District Court denying a motion to recuse should be affirmed.

Respectfully submitted,

D'AMATO, COSTELLO & SHEA
Attorneys for Appellees
SITOMER, SITOMER & PORGES, et al.
116 John Street
New York, New York 10038

ROBERT E. MESHEL
Of Counsel